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Retaining Traditional Tort Liability in the Nonmedical Professions

Carl S. Hawkins*

I. HISTORICAL BACKGROUND

Tort liability for professional malpractice is not some recent invention of greedy claimants or unscrupulous lawyers. Long before the emergence of modern contract and negligence theories in the Anglo-American legal system, persons in "common callings" were liable for injuries inflicted upon others in the course of their work.¹ The term "common calling" was apparently applied to any service occupation regularly pursued, as distinguished from occasional undertakings. It included most of today's professions but did not set professions apart from other occupations and apparently did not distinguish certain callings as particularly vested with a public interest.² Liability of those engaged in these occupations may have been stricter than under modern negligence principles because the defendant might be liable for injury inadvertently caused in the course of his occupation, unless it could be excused by proof of rather extraordinary circumstances.³ Contemporary tort law generally requires the victim of inadvertent injury to prove specific substandard conduct on the defendant's part as the basis of liability.

When contemporary negligence theory developed in the

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1. O. HOLMES, *THE COMMON LAW* 184 (1881); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 480-82 (5th ed. 1956); T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 250-51, 273 (1906); Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927); Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 185-86 (1926).

2. See Arterburn, *supra* note 1, at 418-28.

3. See O. HOLMES, *supra* note 1, at 184-203; T. PLUCKNETT, *supra* note 1, at 480-82; Winfield, *supra* note 1, at 186.

19th century, its dominant purpose was to protect enterprise against the stricter liability of the early common law.⁴ Claims based upon professional malpractice were easily absorbed.⁵ Persons inadvertently injured by those they engaged to perform services might have damage claims for breach of contract, but only if expressed or implied terms of the contract were violated; or they might have claims for tort, but only if negligence could be proved.⁶ Negligence actions against professional persons developed special requirements for proof of negligence by reference to professional standards. Thus, negligence theory shielded professional persons from liability, unless their alleged victims could prove that the defendant's conduct had fallen beneath the standards of the defendant's own profession and had proximately caused the plaintiff's injuries without any contributory fault on the plaintiff's part. These protective developments in legal theory,⁷ coupled with the development of liability insurance in the 20th century,⁸ made it possible for professionals to undertake increasingly large and complex tasks, consistent with the needs of our industrial society, without fear of financial ruin resulting from tort liability to persons damaged.

Now, however, the pendulum may be swinging back against the professions. Tort claims for professional malpractice have accelerated,⁹ and professional liability insurance premiums have

4. See L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS & A. SMITH, *CASES ON THE LAW OF TORTS* 552-54 (2d ed. 1977) [hereinafter cited as L. GREEN]; T. PLUCKNETT, *supra* note 1, at 461, 471; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 139-40 (4th ed. 1971); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Henderson, "Crisis" in Accident Loss Reparation Systems: *Where We Are and How We Got There*, 1976 ARIZ. ST. L.J. 401, 404-10; Winfield, *supra* note 1, at 185.

5. See Wade, *Foreword to T. ROADY & W. ANDERSON, PROFESSIONAL NEGLIGENCE* at v (1960).

6. See W. PROSSER, *supra* note 4, at 613-22.

7. See L. GREEN, note 4 *supra*; Henderson, note 4 *supra*.

8. See W. PROSSER, *supra* note 4, at 542; Henderson, *supra* note 4, at 410-13.

9. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE* 6-7 (1973) [hereinafter cited as REPORT] (medical malpractice claims in 1970 increased by 10.6% over previous year in U.S., by 26% in California); Bergadano, *Recent Developments and Perspectives in Accountants' Professional Liability*, 42 INS. COUNSEL J. 231, 231-32, 241 (1975) (accountants); Epstein, *Medical Malpractice: The Case for Contract*, 1976 A.B.F. RES. J. 87; Jericho & Coultas, *Are Lawyers an Insurable Risk?*, 63 A.B.A.J. 833 (1977); Martin, *Lawyers' Professional Liability—A Developing Crisis?*, 43 INS. COUNSEL J. 532 (1976); Regalia & Johnson, "There But For the Grace of God, Go I," 14 CAL. TRIAL LAW. A.J. 49 (1975) (lawyers); Robin & Syrnick, *Protecting Your Firm Against Liability Claims*, CIV. ENGINEERING, June 1975, at 66 (number of liability claims doubled from 1960 to 1973; dollar amount quadrupled; greater than 210 claims per month in U.S.); Zelle & Stanhope, *Lawyer Malpractice: The*

increased to alleged crisis proportions for some professions.¹⁰ A review of contemporary tort theory and practice as applied to the liability of professional persons will help in assessing the significance of these recent developments.

Although this Article concentrates on the tort liability system, it does not ignore that most injuries and potential claims are disposed of outside the formal adjudication system. Many injuries are simply borne, and many claims are abandoned. Most of the remaining claims are settled and paid by the defendant's liability insurer. Even so, tort theory and the adjudicatory process are still relevant, because they provide the formal standards by which insurance settlements are made. It is, after all, liability insurance that pays most of the settled claims, and liability insurance payments must always take account of potential tort liability. Thus, the purpose of this Article is to discuss the tort and liability insurance systems as the related regimes under which most compensated claims are adjudicated or settled.¹¹

II. CONTEMPORARY TORT THEORY AND PROFESSIONAL LIABILITY

Negligence, the predominant tort theory for professional liability, is based upon the following elements, which normally must be established by the plaintiff: (1) A duty of care imposed upon the defendant by law; (2) a breach or violation of the duty of care by the defendant; (3) a causal relation between defen-

Boomerang Principle, TRIAL, June 1977, at 16; Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221 (1973).

10. Jericho & Coultas, *supra* note 9, at 833 ("alarming decrease in the number of insurance companies willing to underwrite [lawyers'] professional liability insurance"); Robin & Syrnick, *supra* note 9, at 67 (consulting engineers' liability insurance premium doubled between 1969 and 1975); 121 CONG. REC. 10505 ("Between 1960 and 1970, malpractice insurance premiums for dentists rose 115 percent; for hospitals, 262 percent; for physicians other than surgeons, 540.8 percent; and for surgeons, 949.2 percent.").

However, there are more recent indications of a countertrend in malpractice liability insurance for the legal profession. See NAT. L.J., Feb. 16, 1981, at 1 (number of legal malpractice liability insurers increased from 3 to 25 in the last few years; premiums cut by as much as half; causes: improved risk rating methods, competition to get premium dollars for investment income at high interest rates, efforts to discourage development of bar-sponsored insurance companies).

11. Tort principles and the judicial process are determinants which must be considered in any assessment of this system. Other determinants, such as the cultural, social, and psychological forces which contribute to conflict and claims awareness, collateral compensation mechanisms, the particular ethics and dynamics of insurance claims settlement practice, and deficiencies in the delivery of legal services, not directly related to tort principles, are also important but beyond the competence of this author and beyond the scope of this Article.

dant's conduct and plaintiff's injury; and (4) resulting damage to some legally compensable interest of the plaintiff.¹²

The "duty" concept limits defendants' liability to claims arising out of particular relationships and risks.¹³ In professional negligence cases, a contract with the client most often creates the relationship from which the duty of care arises. However, the defendant's tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiff's interests.¹⁴ Thus, when a defendant has undertaken to give professional services gratuitously, liability may be imposed for injuries resulting from substandard conduct, even though there is no contract.¹⁵

Nevertheless, when professional services are performed pursuant to a contract, the concept of privity of contract has been extensively used to shield the defendant from liability for injuries caused to third persons who were not parties to the contract.¹⁶ An example is the "accepted work" doctrine, under which architects and engineers have been insulated from liability to third persons injured by a defective structure after the defendant's work has been completed and accepted by the contracting party.¹⁷ This privity limitation on liability has never set

12. See W. PROSSER, *supra* note 4, at 143, 161-66; Epstein, *supra* note 9, at 96; Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 59 (1962); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 553, 558, 614 (1959); Regalia & Johnson, *supra* note 9, at 50; Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 757, 760, 769, 771 (1959).

13. See W. PROSSER, *supra* note 4, at 324-27; Green, *Duties, Risks, Causation Doctrines*, *supra* note 12, at 59-61.

14. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1049-51 (1956); W. PROSSER, *supra* note 4, at 162; Hawkins, *Professional Negligence Liability of Public Accountants*, 12 VAND. L. REV. 797-98 (1959); McCoid, *supra* note 12, at 553-57; Regalia & Johnson, *supra* note 9, at 50; Roody, *Professional Liability of Abstracters*, 12 VAND. L. REV. 783, 784 (1959); Wade, *supra* note 12, at 756-57.

15. See, e.g., *McNevin v. Lowe*, 40 Ill. 209 (1866) (physician); *Decatur Land, Loan & Abstract Co. v. Rutland*, 185 S.W. 1064 (Tex. Civ. App. 1916) (abstracter); *Stephens v. White*, 2 Va. (2 Wash.) 203, (1796) (attorney); Note, *Remedies: Public Defender's Liability to an Indigent Client for Ineffective Representation*, 30 OKLA. L. REV. 457 (1977).

16. W. PROSSER, *supra* note 4, at 622-23; see authorities cited at note 14 *supra* and note 20 *infra*.

17. "As yet there has been no case which has ruled the architect or engineer liable for a negligently caused physical injury to persons on or off the premises after the structure has been turned over to the owner." Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711 (1959). More recent authorities indicate that liability for physical injuries may extend to noncontracting parties who are foreseeably injured.

comfortably in the area of physical injuries,¹⁸ however, and exceptions, which have always occurred, have multiplied and expanded in recent years to the extent that survival of the privity rule may be in doubt.¹⁹ Nevertheless, where physical injury is not involved and injury to the third party takes the form of lost economic expectations, the privity concept has been an effective limitation on liability. Thus, attorneys and accountants have generally been liable only to their clients, and third parties who have lost money relying upon negligent reports and opinions have not been compensated,²⁰ except when their reliance was quite obviously to be expected for limited purposes that could have been anticipated.²¹

The role of the duty concept in professional tort liability cases is thus an important, but relatively narrow one, which protects the professional from liability for injuries caused to persons in attenuated nonclient relationships.

The most important issue in nearly all professional negligence cases is the defendant's breach or violation of a duty of care.²² Again, this concept precludes liability unless the injured

See *Pastorelli v. Associated Engineers, Inc.*, 176 F. Supp. 159 (D.R.I. 1959) (supervising engineer liable to owner's employee injured by falling duct after construction completed); Davidson, *The Liability of Architects*, TRIAL, June 1977, at 20; Note, *supra* note 9, at 1223-25.

18. See W. PROSSER, *supra* note 4, at 622-27, 680-82.

19. *Id.*; Davidson, note 17 *supra*.

20. See *Savings Bank v. Ward*, 100 U.S. 195 (1879) (attorney); *Goodman v. Kennedy*, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (attorney); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (accountant not liable to third party for negligence; may be liable for fraud); *Le Lievre & Dennes v. Gould*, [1893] 1 Q.B. 491 (C.A.) (architect's erroneous progress certificate); Bergadano, *supra* note 9, at 234-39 (accountants); Haughey, *Lawyers' Malpractice*, 48 NOTRE DAME LAW. 888, 894 (1973); Hawkins, *supra* note 14, at 812-21 (accountants); Roady, *supra* note 14, at 784-89 (abstracters); Wade, *supra* note 12, at 758-60 (attorney); Comment, *New Developments in Legal Malpractice*, 26 AMER. U.L. REV. 408, 421-29 (1977).

21. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (attorney may be liable to intended beneficiaries of negligently drafted will); *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958) (notary, improperly acting as an attorney, drew up invalid will; liable to intended beneficiary); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App. 1971) (accountant liable to third-party lender who relied upon erroneous audit, when accountant supplied audit directly to lender at borrower's direction); cf. *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (public weigher employed by seller, liable to buyer to whom erroneous certificate was supplied); *Regalia & Johnson*, *supra* note 9, at 56-59 (limited instances of lawyers' third-party liability); Comment, note 20 *supra* (lawyers' third-party liability).

22. See W. PROSSER, *supra* note 4, at 161-66; Bell, *supra* note 17, at 716 (architects and engineers); Bergadano, *supra* note 9, at 232 (accountants); Curran, *Professional Negligence—Some General Comments*, 12 VAND. L. REV. 535, 537-40 (1959); Davidson,

person proves that the defendant's conduct was substandard to the norms of the defendant's profession. The jurors are not permitted, as they are in most other negligence cases, to infer from their own experience and from the circumstances of the particular case what the standard of reasonable care should be.

The proof of the defendant's negligence or breach of duty involves two components: (1) Establishing the standards of the profession, and (2) producing evidence of substandard conduct by the defendant. The legal standard is easily stated: "[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing" ²³ That is not necessarily the quantitative average or median of the profession, but the minimum competence required of those who are recognized as qualified in the profession. ²⁴

The difficulties in applying this standard are largely problems of proof. Because the professions are defined by reference to specialized knowledge and skills that are not available to lay persons, proof of professional standards must generally come from an expert witness who is a member of the profession and claims to know its standards. The problems of finding members of the profession willing to testify against their own are considerable, even if there is not a "conspiracy of silence" in the non-medical professions. Because the professional standard will rarely be set by prescriptive or objective rules with sufficient specificity for the particular case, proof will usually come down to conflicting expert opinions. That is a source of difficulty. Although professional persons may not overtly object to the abstract legal principle that would hold them liable for malpractice by reference to their own professional standards, they may resent bitterly the process in which another member of their profession, acting as an expert witness under the tutelage of a skilled adversary, presumes to judge the defendant's conduct in the particular circumstances, with a jury of laypersons making

supra note 17, at 22 (architects); Fleming, *Developments in the English Law of Medical Liability*, 12 VAND. L. REV. 633, 640-46 (1959); Hawkins, *supra* note 14, at 802-09 (accountants); McCoid, *supra* note 12, at 558-75 (medical practitioners); Regalia & Johnson, *supra* note 9, at 50-51; Roady, *supra* note 14, at 786-90 (abstracters); Zelle & Stanhope, *supra* note 9, at 18.

23. RESTATEMENT (SECOND) OF TORTS § 299A (1977).

24. *Id.* Comment e; W. PROSSER, *supra* note 4, at 163.

the ultimate decision between conflicting expert opinions.

The rule that the professional must be judged by the standards of the profession is frequently reinforced by two related ideas: (1) The standards must be those of the defendant's particular school when there are different schools of thought within the profession;²⁵ and (2) a professional may not be found negligent for a mere error in judgment.²⁶ The former principle is well established in medical malpractice cases but has had little apparent development in claims against the other professions, perhaps because different "schools of thought" are not so well developed in the other professions. The latter idea is used to instruct the jury that a defendant may not be found negligent merely because hindsight suggests that he may have made an unfortunate decision, when by the standards of the profession it was an acceptable choice among other alternatives at the time. However, a professional may be liable for mistakes in judgment that fall below the standards of the profession.²⁷

In other kinds of cases, the victim is occasionally relieved of the heavy burdens of proving negligence by the use of *res ipsa loquitur*. This rule, when invoked by the court, permits the jury to find negligence, without specific proof of substandard conduct, from the mere fact that injury occurred under circumstances that are probably best explained by a commonsense inference of negligence.²⁸ By definition, this rule is not generally available in professional service cases because the technical circumstances in which injury occurs are generally beyond the jury's competence to evaluate or draw inferences on the basis of common experience.²⁹ While recent expansion of the use of *res ipsa loquitur* in medical malpractice cases³⁰ has been cited as

25. See W. PROSSER, *supra* note 4, at 163; McCoid, *supra* note 12, at 560-65. This rule as to different "schools of thought" should be distinguished from the rule that a "specialist" within a profession is to be judged by the higher standards of his speciality rather than the general standards of the profession. See McCoid, *supra* note 12, at 566-67. There is some indication that this rule as to specialists may be extended to the legal profession. See *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (Ct. App. 1975); Comment, *New Developments in Legal Malpractice*, *supra* note 20, at 411-15.

26. See W. PROSSER, *supra* note 4, at 162 (medical profession); Haughey, *supra* note 20, at 897 (lawyers); Wade, *supra* note 10, at 764-65 (legal profession).

27. *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 438 P.2d 865 (1968).

28. See W. PROSSER, *supra* note 4, at 211-28.

29. *Id.* at 164-65, 226-28.

30. See, e.g., *Clark v. Gibbons*, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967); *Quintal v. Laurel Grove Hosp.*, 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964); Epstein, *supra* note 9, at 138-41; Meisel, *The Expansion of Liability for Medical*

possibly contributing to the liability insurance crisis in the medical profession,³¹ there is little indication of its extensive or expanded use in tort claims against the nonmedical professions.³²

Once the negligence issue is overcome, the issues of causal relation and damage remain. In claims against architects and engineers involving physical injuries, the causal relation issue should be a straightforward, factual question of molecular connections.³³ However, the issue is occasionally burdened with additional complications—under the name of “proximate cause” — when forces other than the defendant’s conduct have been instrumental in bringing about the injury.³⁴ The causation issue gets into more difficult subjective problems in claims against lawyers and accountants when the injury takes the form of lost economic expectations. Even if the client proves such loss and the defendant’s negligence, the case may be lost because of the client’s inability to prove reliance upon the defendant’s mistake.³⁵ A similar complication in claims against attorneys for litigation malpractice requires the client to prove the ultimate mer-

Accidents: From Negligence to Strict Liability by Way of Informed Consent, 56 NEB. L. REV. 51, 52, 65-73 (1977).

31. [*Res ipsa loquitur* has been an issue in an increasing percentage of appellate decisions in the past 20 years. It was considered in 13.4% of the cases decided in the period 1961-1971 as compared with only 6.3% of the cases decided prior to 1950. The Commission is concerned that doctrines like *res ipsa loquitur* not be expanded judicially to the point where the liability of health-care providers is based solely on circumstantial evidence of negligence. The trend in this direction is disturbing and, if not checked, could further aggravate the existing problems.

REPORT, *supra* note 9, at 29.

32. See Bell, note 17 *supra* (architects and engineers; no mention of cases decided on the basis of *res ipsa loquitur*); Haughey, *supra* note 20, at 893 (lawyers; no serious assault on rules as to burden of proof); Hawkins, note 14 *supra* (public accountants; no *res ipsa loquitur* cases); Wade, *supra* note 12, at 766 (“There is no indication of application of the doctrine of *res ipsa loquitur* to attorney-negligence cases.”); Zelle & Stanhope, *supra* note 9, at 18-19 (lawyers’ malpractice; some recent expansion); Comment, *supra* note 20, at 429, 432 (suggesting that recent decisions may recognize a few errors, such as allowing the statute of limitations to run before filing a claim, as being so obvious that specific evidence would not be required to establish negligence).

33. See Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 548-61 (1962).

34. *E.g.*, Miner, Read, & Garrette v. McNamara, 81 Conn. 690, 72 A. 138 (1909).

35. See Laehn Coal & Wood Co. v. Koehler, 276 Wis. 297, 64 N.W.2d 823 (1954) (attorney who purchased property for client without disclosing tax lien was not liable; client unable to prove that he would not have ratified the transaction if he had known of the tax lien); Mead v. Ball, Baker & Co., 106 L.T.R. (n.s.) 197, 38 T.L.R. 81 (C.A. 1911) (investor unable to prove that bad investment had in fact been induced by erroneous financial information supplied by accountant); Regalia & Johnson, *supra* note 9, at 51-52 (attorney malpractice).

its of the claim or defense which was forfeited due to the attorney's negligence,³⁶ and even to prove that the lost judgment, if won, would have been collectible.³⁷

Proof of damage is always an important issue in any tort case, but the issue rarely assumes any peculiar characteristics in negligence claims against the professions.³⁸

Tort theories other than negligence are rarely used against professions. The rigors of negligence theory are occasionally avoided in suits against members of the medical profession by raising claims of assault and battery for unauthorized medical operations³⁹ or by pointing to a lack of "informed consent,"⁴⁰ but there is no apparent equivalent for the nonmedical professions. It has been persuasively argued that the law of deceit or misrepresentation, with its portent of stricter liability, is better suited than negligence theory for claims against professional suppliers of information in high-level financial transactions.⁴¹ However, such cases are still frequently litigated as negligence claims.⁴² It is theoretically possible to sue architects and engineers for breach of warranty or to hold them strictly liable in tort for injuries caused by defective products, but the corporate manufacturer or seller is usually the target defendant in such product liability cases, and so far the courts have refused to extend such strict liability to the providers of professional

36. See Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958); Wade, *supra* note 12, at 769-70; Zelle & Stanhope, *supra* note 9, at 18; Comment, *supra* note 20, at 433-35.

37. See Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918). These are really questions of "damage" and not "causal relation."

38. However, it should be noted, as emphasized several places in the text, that tort claims against the nonmedical professions may involve two quite different kinds of damage: (1) physical harm, and (2) lost economic expectations.

39. See W. PROSSER, *supra* note 4, at 104-05.

40. For criticism of the misuse of "informed consent" as battery when it should be a negligence claim, see W. PROSSER, *supra* note 4, at 165-66; Plant, *An Analysis of "Informed Consent,"* 36 FORDHAM L. REV. 639 (1968).

41. Green, *The Communicative Torts*, 54 TEX. L. REV. 1 (1975). Such theories have been used against the nonmedical professions. See *United States v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958) (architect); *Rozny v. Marnul*, 43 Ill. 2d 54, 62, 65-66, 250 N.E.2d 656, 660, 663 (1969) (surveyor); *Olitkowski v. St. Casimir's Sav. & Loan Ass'n*, 302 Mich. 303, 4 N.W.2d 664 (1942) (attorney); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (accountant); Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966).

42. See *Maxey v. Quintana*, 84 N.M. 38, 499 P.2d 356 (Ct. App. 1972) (realtor); *Shatterproof Glass Corp. v. James*, 446 S.W.2d 873 (Tex. Civ. App. 1971) (accountant); RESTATEMENT (SECOND) OF TORTS § 552 (1977).

services.⁴³

Consequently, concern with tort liability for the nonmedical professions necessarily focuses upon the negligence theory. The foregoing discussion shows that the most significant characteristic of that theory has been its defensive thrust. It serves to protect professionals from liability for injury to clients or third persons in most cases, and permits the imposition of liability only when the claimant can overcome the heavy burden of proving substandard conduct by reference to the profession's own standards. If there is cause for criticism, it is not in the theoretical statement of negligence principles, but in the way in which they are applied or misapplied in the course of adversary proceedings.

III. THE TRADITIONAL TORT/LIABILITY INSURANCE REPARATIONS SYSTEM AND NONMEDICAL PROFESSIONS: ITS ADVANTAGES AND DISADVANTAGES

The traditional tort and liability insurance system has survived through an era of dynamic change in technology and social and economic relationships because it combines (1) an acceptable standard of liability with (2) a credible conflict-resolution process, to provide (3) an individualized remedy (4) that is accessible on private initiative and (5) has been made workable by liability insurance.

Negligence theory has provided a workable standard of liability because it is highly flexible and can adjust to changing conditions without revising the law.⁴⁴ The negligence standard changes as professional practices change. The negligence standard is also acceptable because it commands sufficient moral support to be enforceable. The professions cannot overtly repudiate a rule that purports to judge them by their own standards. On the other hand, the public is not yet adverse to leaving some victims uncompensated when the defendant professional has done nothing wrong. Importantly, if some of the injuries resulting from professional services are to be compensated while others are not, the legal standard that discriminates between such losses must have some rational basis that enjoys moral support, and it is by this test that the negligence theory should be

43. See Note, note 9 *supra*; but see Davidson, *supra* note 17, at 23.

44. See Green, *The Regenerative Process in Law*, 33 IND. L.J. 166, 168-70 (1958); Hawkins, *supra* note 14, at 822-23; Henderson, *supra* note 4, at 408-09; Wade, note 12 *supra*.

judged.⁴⁵ If it is judged by reference to an assumption that all injuries should be compensated, it will be irrelevant and indefensible.

The traditional tort system has survived this long, in part, because it employs a credible conflict resolution process.⁴⁶ The process is presided over by a prestigious, neutral referee and decision maker, the judge, in whom we have invested generations of tradition and elaborate institutional arrangements to assure his impartiality and fairness.⁴⁷ By the peculiar genius of the common law, his decisionmaking responsibilities are shared by the lay public through jury participation.⁴⁸ The interests of the parties are represented by trained advocates who shape the issues, marshal the evidence, and present the proof in the ways they think most relevant to their client's concerns.⁴⁹ Although the process is intricate, cumbersome, and often expensive, experience has proven that the outcome is sufficiently acceptable, even to the loser, and has sufficient moral force as to make it enforceable at relatively low public cost.⁵⁰

The traditional tort system provides a remedy that is individually fashioned in response to the peculiar circumstances of each case. Alternative reparation systems, such as worker's compensation and automobile no-fault legislation, have invariably imposed stricter limitations on the remedy, both as to total amount and as to the compensability of particular items.⁵¹ Tort damage theory has few arbitrary limitations and, as applied by the jury in each individual case, is responsive enough to include such items as pain and suffering, indignity, loss of social ameni-

45. See W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM 5-15, 30-32, 58-65, 71-72 (1965); Epstein, *Automobile No-Fault Plans: A Second Look At First Principles*, 13 CREIGHTON L. REV. 769, 788 (1980); Henderson, *supra* note 4, at 409.

46. See P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 1-21 (2d ed. 1977); F. JAMES & G. HAZARD, CIVIL PROCEDURE 4-8 (2d ed. 1977); Adams, *The Small Claims Court and the Adversary Process: More Problems of Function and Form*, 51 CAN. B. REV. 583, 592-600 (1973); Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123 (1974).

47. See B. CARRINGTON & B. BABCOCK, *supra* note 46, at 9-10, 17-18; F. JAMES & G. HAZARD, *supra* note 46, at 5; Adams, *supra* note 46, at 593-94; Green, *The Study and Teaching of Tort Law*, 34 TEX. L. REV. 1, 10-13 (1955).

48. See Green, *supra* note 47, at 13-15; Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483-84 (1956).

49. See F. JAMES & G. HAZARD, *supra* note 46, at 4-8; Adams, *note 46 supra*.

50. See P. CARRINGTON & B. BABCOCK, *supra* note 46, at 1; Adams, *supra* note 46, at 594.

51. See W. BLUM & H. KALVEN, *supra* note 45, at 36.

ties, and impaired family relations, as well as out-of-pocket economic losses.⁵² Although some recent studies have cast doubt upon the importance of damages for pain and suffering, in terms of public acceptability,⁵³ it is still important that the tort process give injured persons the satisfaction of feeling that their dignitary interests have been individually assessed.

The traditional tort process is one that is accessible by individual initiative to any victim.⁵⁴ An injured person has immediate access to the powers of government by hiring a lawyer and filing a lawsuit. This advantage may be overstated because some individuals may have difficulty finding a lawyer who will present the case.⁵⁵ Furthermore, court congestion, aggravated by the complexities of tort theory and practice, may unconscionably delay the remedy.⁵⁶ But the fact remains that the victim does not need the permission of anyone else to assert the claim, nor must he wait upon some government agency to investigate or prosecute it. Once an individual has filed a claim, the other side is required to respond, and both parties stand as equals before the court, no matter how unequal they might be in political, social, and economic power outside the courtroom.⁵⁷ And this all proceeds in the open air of public scrutiny.⁵⁸

Notwithstanding these considerable strengths of the tort-adjudication process, it is doubtful that the system could have survived this long without assistance from the institution of liability insurance.⁵⁹ At least in some major areas of accident reparations, the insurance settlement process carries the burden of disposing of most cases; the judicial system would have collapsed long ago if individual adjudication had been required for more than a small fraction of the increasing claims generated by our technological society.⁶⁰ Liability insurance did not play such a

52. See W. BLUM & H. KALVEN, *supra* note 45, at 35-36; Green, *supra* note 33, at 574-75; Green, *No-Fault: A Perspective*, 1975 B.Y.U. L. REV. 79, 82-83; Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 310-11 (1929).

53. See O'Connell & Simon, *Payment for Pain & Suffering: Who Wants What, When & Why?*, 1972 U. ILL. L.F. 1, 29-34.

54. See Green, *No Fault: A Perspective*, *supra* note 52, at 82.

55. See Adams, *supra* note 46, at 602-03.

56. See J. O'CONNELL, *ENDING INSULT TO INJURY* 29-55 (1975); J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 3-7 (1971).

57. See Green, *No Fault: A Perspective*, *supra* note 52, at 82.

58. *Id.*

59. See Henderson, *supra* note 4, at 410-15, 418.

60. See A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 3-4, 237-55 (1964) [hereinafter cited as A. CONARD].

major role in the disposition of malpractice claims against the nonmedical professions until quite recently, but there is little doubt about its importance in this area today.

The observed advantages of the tort and liability insurance system must, of course, be weighed against some important disadvantages. From the victim's perspective, the most serious disadvantage is that not all victims are compensated.⁶¹ Only those who can afford to invoke the process and who are able to prove the defendant's fault will be compensated. Liability and damages are very complex issues and thus require large investments of time and effort to get compensation.⁶² Meritorious small claims go unprosecuted because of these heavy costs.⁶³ Payment of compensation may be delayed beyond the time when it is most needed. Lastly, access to the full advantages of the traditional tort system requires the expensive services of a lawyer.

From the perspective of the liability insurer, the complexities and vagaries of the tort adjudication process unduly complicate the fixing of rates and reserves and make coverage very risky and often unprofitable.⁶⁴

From the perspective of the defendant-professional, liability insurance costs may be too high or insurance may be unavailable. Members of the professions have a particular dislike for involvement in adversary proceedings.⁶⁵ They resent having their professional skill and judgment questioned in public by other professionals acting as expert witnesses and they doubt that jurors have the capacity to deal with such technical matters. Professionals suspect that the jury is more likely to empathize with the victim than to understand the difficulties of professional practice. They are concerned that their professional reputation may be damaged, regardless of the outcome of the case, and such injury to reputation is not remedied by liability insurance.

How, then, shall these claimed advantages be weighed against the claimed disadvantages in the modern setting of tort liability for the nonmedical professions? No objective cost-bene-

61. See J. O'CONNELL, *ENDING INSULT TO INJURY* 29, 41 (1975).

62. *Id.* at 29-30.

63. *Id.* at 41.

64. REPORT, *supra* note 9, at 41-42; Jericho & Coultas, *supra* note 9, at 833-35.

65. See REPORT, *supra* note 9, at 18-20; Fleming, *supra* note 22, at 634; Polsky, *The Malpractice Dilemma: A Cure for Frustration*, 30 TEMP. L.Q. 359 (1957); Starr, *Malpractice: The Doctor's Discomfort*, BAR LEADER, Jan. 1976, at 10.

fit study is yet available,⁶⁶ and there is disagreement over the subjective measures of satisfaction and dissatisfaction with the traditional system.⁶⁷ It might simply be concluded that the burden of proof has not yet been carried by the proponents of change. But first, the present situation of tort liability of the nonmedical professions should be compared with other areas of tort law where the traditional system has been replaced or supplemented by an alternative reparation system. The two obvious analogies are automobile no-fault statutes and worker's compensation statutes—alternatives which have developed particularly in the tort context as a replacement or supplement for faltering adjudicatory processes.

IV. FAILURES OF THE TRADITIONAL TORT SYSTEM AND SUBSTITUTE REPARATION SYSTEMS

Automobile personal injury no-fault statutes are the most recent example of a substitute or supplementary reparation system.⁶⁸ It is still unclear whether this phenomenon will expand to nationwide coverage⁶⁹ or whether it will ever become more than a supplementary small claims system.⁷⁰ Either way, it must be

66. Compare the extensive empirical studies which provided the data needed for automobile no-fault legislation: A. CONARD, note 60 *supra*; 1 U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS (1970); WALTER E. MEYER RESEARCH INSTITUTE OF LAW, DOLLARS, DELAY AND THE AUTO VICTIMS (1968); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

67. Compare J. O'CONNELL, note 61 *supra*, with W. BLUM & H. KALVEN, note 45 *supra*.

68. A summary of automobile no-fault legislation is contained in O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23, 26-27 (1977) [hereinafter cited as O'Connell, *Operation of No-Fault*.] Other recent discussions of developments in automobile no-fault legislation include Epstein, note 45 *supra*; Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 OR. L. REV. 287 (1977); Lewis, *Latest No-Fault Developments—The New York State Insurance Department's Role*, 1980 INS. L.J. 267; O'Connell, *No-Fault and Political Practicalities*, 1980 INS. L.J. 82; O'Connell & Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, 1979 INS. L.J. 129.

69. O'Connell observes that some form of automobile no-fault legislation was enacted in 24 states between 1970 and 1975, but the movement has stalled with no more states adopting a no-fault statute since 1975. O'Connell, *Operation of No-Fault*, note 68 *supra*. One of the 24 states, Nevada, repealed its no-fault statute, NEV. REV. STAT. §§ 698.010-.510 (repealed 1980); and "repeated efforts to introduce some automobile no-fault plan at the federal level, be it through direct enactment or by the creation of minimum standards for state plans," have failed. Epstein, *supra* note 45, at 770.

70. Of the 23 states that have no-fault statutes, nine impose no tort liability exemption, so that the statutes merely provide first-party insurance benefits as a supplement to the tort reparations system. Of the remaining 14 statutes, 13 impose a tort liability exemption threshold of \$2,000 or less in medical expenses, so that the "no-fault" system is

viewed as a significant example of legislative dissatisfaction with the traditional tort system. Closer examination of this phenomenon indicates that many of the reasons for replacing the traditional tort liability approach with automobile personal injury no-fault statutes do not apply to the liability of nonmedical professions.

In traffic injury cases, the traditional fault concepts of negligence and contributory negligence were difficult to apply realistically. With millions of motor vehicles moving at high speeds in limited areas, frequent collisions inevitably resulted from many causes, including mechanical failures, road conditions, and split second driver decisions that are not easily characterized in terms of moral fault. The difficulties of recapturing these fast-moving events in credible testimony after the event were almost insurmountable. In other words, there was very little assurance that the traditional tort system was deciding which victims should be compensated on the basis of the fault assumptions upon which the rules were based.⁷¹

Moreover, both the judicial system and the liability insurance system for settling claims were so overloaded with small claims that serious malfunctions resulted. Court congestion and the complexity of the fault issues not only caused serious delay in payments but resulted in the overpayment of nuisance claims and underpayment of serious injuries.⁷² The public became so concerned about the numbers of uncompensated victims that it became a political issue.⁷³ Carefully documented empirical studies showed an unacceptable cost-benefit ratio in liability insurance payouts.⁷⁴

Although the fault concept poses some difficulties in professional liability claims, they are not the same difficulties encountered in the automobile personal injury context. In professional malpractice cases, the burden of proving fault is very heavy be-

the exclusive remedy for only relatively "small claims." See Green, *No-Fault: A Perspective*, *supra* note 52, at 84-86; Keeton, *Compensation Systems and Utah's No-Fault Statute*, 1973 UTAH L. REV. 383, 385-90.

71. J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 9-14 (1971).

72. See *id.* at 5-7; 1 U.S. DEP'T OF TRANSPORTATION, *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* 235 (1970); U.S. DEP'T OF TRANSPORTATION, *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* 94-100. (1971).

73. O'Connell, *Operation of No-Fault*, *supra* note 68, at 26-27.

74. Cost-benefit data from the various studies is graphically summarized in P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* 790-95 (2d ed. 1977).

cause of the complexity of the issue and because proof must come from the defendant's own profession. However, there is no widespread concern, as in the automobile injury cases, that events are so fast-moving that evidence on the fault issue has very little to do with the actual facts of the case. Moreover, the plaintiff's contributory fault, which is almost always an issue and frequently a critical issue in most automobile personal injury cases, plays no important part in most professional malpractice cases.⁷⁵

No evidence indicates that the judicial system or the insurance settlement system has become overloaded with small claims in professional malpractice. In fact, it appears that the costs of prosecuting professional malpractice claims are so high and the risks are so great that only the more serious injuries are accepted for prosecution.⁷⁶ At least there does not appear to be anything comparable to the nuisance settlement phenomenon which occurred in automobile liability insurance practice. Nor does any apparent evidence point out that the numbers of uncompensated victims from professional services have become so large as to create a general social welfare problem.⁷⁷ Although there is evidence of rapidly rising liability insurance costs, even for the nonmedical professions,⁷⁸ the increase has not yet spawned the level of public concern that aroused state legislatures to action in the automobile accident field.⁷⁹

Perhaps even more important than the above differences are the special conditions in the automobile injury setting that facilitated the legislative imposition of a supplementary no-fault reparation system. It was easy to define the "compensable event"—a physical injury produced by an automobile—without reference to the fault of the parties. But the injury resulting from professional services among the nonmedical professions

75. See Hawkins, *supra* note 14, at 809-12 (accountants); Regalia & Johnson, *supra* note 9, at 53-56 (lawyers).

76. See J. O'CONNELL, *supra* note 61, at 30; REPORT, *supra* note 9, at 10-11, 18, 32-33, and app., at 13, 20-21 (1973); Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 1976 INS. L.J. 90, 93-94; Carpenter, *The Patient's Compensation Board: An Answer to the Medical Malpractice Crisis*, 1976 INS. L.J. 81, 83; Starr, *supra* note 65, at 11.

77. The problem of uncompensated victims may be approaching the dimensions of a serious social welfare problem in the medical malpractice area. See REPORT, note 9 *supra*.

78. See authorities cited at note 10 *supra*.

79. See O'Connell, *Operation of No-Fault*, note 68 *supra*.

may often be described no more precisely than client dissatisfaction, which is difficult to contemplate as defining the compensable event for insurance payments without reference to whether the professional services were substandard (*i.e.*, negligent).⁸⁰

Most motorists already had some form of automobile accident insurance before the no-fault requirements. The no-fault legislation required no more than a conversion of this third-party liability insurance, in part, to first-party casualty insurance. Existing requirements for registration and licensing of motor vehicles provided a control point for enforcing the first-party insurance requirements.⁸¹

By way of contrast, most persons injured by professional services do not have insurance covering that particular activity, and there is no convenient licensing or regulatory scheme through which clients must pass in order to seek professional services. Consequently, no-fault insurance coverage for persons injured by the nonmedical professions would have to be third-party liability insurance, purchased by the professional to cover his clients and other potential victims.⁸² This creates an entirely different set of conditions because the person injured cannot rely upon market incentives to regulate his dealings with the insurer.⁸³ This suggests that worker's compensation statutes, a form of third-party no-fault liability insurance, may provide a closer analogy to the professional liability situation than do the automobile personal injury no-fault systems, which employ a first-party casualty insurance scheme.

Worker's compensation statutes provide the earliest example of a statutory no-fault reparation system being substituted for the traditional tort liability system. However, the reasons for dissatisfaction with the tort system as applied to injured employees have very little relevance to current concerns about the tort liability of professionals. Defensive tort doctrines, which were developed during the 19th century to relieve enterprises from the burden of compensating their victims, applied with particular harshness to defeat the claims of many injured em-

80. See J. O'CONNELL, *supra* note 61, at 72-73; Abraham, *Alternatives to the Tort System for the Nonmedical Professions: Can They Do the Job?*, 1981 B.Y.U. L. REV. 57, 61-62; Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 614-15 (1973).

81. See J. O'CONNELL, *supra* note 61, at 70-71.

82. *Id.* at 89-111.

83. See J. O'CONNELL, *supra* note 71, at 95-96.

ployees.⁸⁴ These defenses of contributory negligence, assumption of risk, and negligence of fellow employees, have had very little effect upon tort claims based upon professional malpractice. Moreover, the incentive for worker's compensation reform came principally from widespread public concern for the rehabilitation of large numbers of uncompensated victims and their dependents who had become a general social welfare problem.⁸⁵ In individual terms, the problems of some uncompensated victims of professional malpractice may be just as serious,⁸⁶ but again little evidence indicates that their numbers have reached the proportions of a public welfare problem.

Because the worker's compensation systems provided for third-party insurance—with employers providing insurance coverage for injured workers—substantial governmental involvement was required to assure adequate protection of employee interests.⁸⁷ The statutes also imposed fixed limits on compensation⁸⁸ which have been criticized for providing inadequate relief and for failing to respond to changing economic conditions.⁸⁹ To the extent that these conditions apply in a third-party insurance no-fault scheme, they must be considered potential problems in devising no-fault insurance alternatives for the non-medical professions. In that context, such extensive administrative enforcement and such severe limitations on compensation might be unacceptable.

In the area of employee injuries, the worker's compensation remedy has not been exclusive. Third-party tort suits against persons other than the employer whose conduct might have contributed to the employee's injury have provided an important

84. See W. PROSSER, *supra* note 4, at 525-34; Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 260-70 (1929); Henderson, *supra* note 4, at 413-14.

85. See W. PROSSER, *supra* note 4, at 530-31; Henderson, *supra* note 4, at 413-14.

86. However, fewer of the injuries caused by the nonmedical professions will be physical harms to the person.

87. See generally A. LARSON, *WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH* §§ 78.00, 78.10, 80.00, 80.10, 81.00, 82.60, 92.00, 92.60, 97.00 (Desk ed. 1972); W. MALONE, M. PLANT & J. LITTLE, *CASES AND MATERIALS ON THE EMPLOYMENT RELATION* 451-70 (1974).

88. See A. LARSON, *supra* note 87, at §§ 2.50, 58.00, 58.10; W. MALONE, M. PLANT & J. LITTLE, *supra* note 87, at 46-49, 365, 372-74, 402-05.

89. See W. MALONE, M. PLANT & J. LITTLE, *supra* note 87, at 374; Katz & Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?*, 4 LA. L.J. 167 (1953); Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 128-30 (1952).

and substantial supplement.⁹⁰ No one has measured the extent to which this tort supplement has been necessary to the acceptance of the worker's compensation system.⁹¹ It is not clear who would be the unwilling Samaritans to provide supplementary tort remedies for the victims of professional services if the liability of the professions were limited to some no-fault insurance payment.

V. PERSPECTIVE

The traditional tort liability system has been replaced or supplemented with some form of mandatory insurance providing limited compensation on a no-fault basis when the following conditions have combined:

1. An expanding area of activity that produces a high volume of disabling bodily injuries to many members of the general public;
2. Inadequate adjustments in tort law or in the management of the judicial system;
3. Resulting stress on the liability insurance system; and
4. Emergence of a widely perceived social welfare problem as to the compensation of victims.

Conditions regarding persons injured by the nonmedical professions have not developed to an extent or in a way comparable to these conditions that led to worker's compensation and automobile injury no-fault compensation statutes. For example:

1. Even though claims against the nonmedical professions have been increasing, most of the claims involve lost economic expectations and not disabling bodily injuries.⁹²

2. Tort law and the judicial system may not have responded adequately to particular difficulties in professional malpractice

90. See A. LARSON, *supra* note 87, at §§ 71.00, 71.10.

91. The May 1977 issue of *For the Defense*, p. 63, reports some interesting figures from a recent survey conducted by the Insurance Services Offices. As to insurance claims paid in product liability cases, injuries to workers at their places of employment account for 55% of bodily injury claims and 64% of the amount paid. This indicates that a major function of products liability claims has been to provide a supplementary remedy for workers whose claims against their employers were limited to recovery of workmen's compensation benefits.

92. Malpractice by lawyers and accountants almost always produces lost economic expectations rather than bodily injury. Malpractice by architects and engineers may result in bodily injury, but such claims account for less than 15% of total settlement dollars, and the bulk of the claims are for property damage and structural remedial costs. Robin & Syrnick, *supra* note 9, at 66.

cases, such as the proof of professional standards. However, nothing is comparable either to the unholy trinity of defenses that made a mockery of most worker's tort claims prior to worker's compensation statutes, or to the docket-clogging flood of automobile injury claims that provided impetus for no-fault statutes for small claims.

3. Concern is growing over rising costs and the availability of liability insurance for the nonmedical professions, but the evidence is inconclusive as to whether the problem is approaching a crisis level.⁹³

4. The fourth condition above, which has been a major impetus for previous no-fault movements, is certainly not evident as applied to the victims of the nonmedical professions. Dissatisfaction with the existing system and calls for change come, not from large numbers of uncompensated victims and their political representatives, but rather from the professionals and their liability insurers who fear excessive liability.⁹⁴ This is not to say that current dissatisfaction with the tort system as applied to the nonmedical professions is unconcerned with consumer interests, because the consumers of professional services will surely have to pay for rising liability insurance costs. But in terms of the impetus for legislative reform, the causes for dissatisfaction with the traditional tort system as applied to the nonmedical professions come from a different direction with a quite different appeal than the social welfare concerns that fueled the worker's compensation and automobile no-fault movements.

Mandatory first-party insurance, which appears to be the more efficient no-fault system, is not realistically possible for the victims of the nonmedical professions. Mandatory third-party no-fault insurance may require more severe limitations on compensation and a heavier administrative enforcement apparatus than the public is prepared to accept.

Consequently, it appears that the traditional tort/liability insurance system will probably continue for some time as the basic reparation scheme for persons injured by the nonmedical professions. Leon Green put the issues in perspective almost 50 years ago:

The process in negligence cases, of all the patterns of the judicial process, is least fixed and most flexible. Judge, jury, and

93. See authorities cited at note 10 *supra*.

94. See text accompanying notes 9-10, 65-67 *supra*.

formulas which go to make up the process may react differently in every case. The process is highly individualistic, highly elastic. It allows the widest latitude for judgment. No aggregate of scholars or judges or practitioners can anticipate its judgment with assurance in a single complex case. Each case is new to it and must be subjected to it for a fresh judgment. It is slow and tedious. . . . When society has made up its mind and insists upon quantity production—something automatic and uniform, something simple and “fool proof”—the high individualism of the judicial process in negligence cases will prevent its meeting these demands. Here the stage of experiment has passed and a standardized machinery which gives dependable results without exacting too much judgment is required. This is the stage for . . . workmen’s compensation, . . . commissions and other so-called administrative devices.⁹⁵

The tort liability system has not yet reached the point when volume requires automation in processing professional liability claims, except possibly for medical injury claims. That is not to say that the time will never come for the other professions, but when it does, distinctive problems among the several professions will probably lead to the development of varied alternatives or supplements rather than to a comprehensive reparation system covering all of the professions.

Distinctive alternatives should develop in response to the difference between bodily injuries and lost economic expectations. The former, because of their appeal to social welfare concerns and the ease of defining the compensable event, are more easily accommodated under the basic protection logic of no-fault plans, in which limited compensation is paid on the basis of injury alone. These characteristics, in addition to the more widespread incidence of medical injury, set medical claims apart from the claims against most of the other professions.

Among the nonmedical professions, only the design and engineering professions are likely to have claims for bodily injury resulting from their professional services. When the volume of such claims becomes high enough and liability insurance becomes too costly, they are likely to be swept into whatever alternative reparation scheme has been developed for medical injury claims, assimilated under some more comprehensive compensation plan for all bodily injuries, covered by a national health insurance plan, or handled by some combination of the above.

95. Green, *The Duty Problem in Negligence Cases: II*, *supra* note 52, at 281.

However, most malpractice claims against the design and engineering professions, and almost all claims against lawyers, accountants, and other financial service professions, will involve lost economic expectations rather than bodily injury.⁹⁶ Such economic losses are not likely to qualify for mandatory no-fault insurance legislation, not only because they lack basic social welfare appeal, but also because the compensable event may be impossible to define without reference to some fault in the quality of professional services.⁹⁷ On the other hand, the commercial setting of many such claims invites bargained alternatives to tort liability, such as compulsory arbitration, mediation, presuit hearing panels, and elective no-fault insurance.

The legal profession, because of the conflict of interest arising from its exclusive access to and special influence upon the judicial system, should assume peculiar responsibilities in providing remedies for malpractice claims against its own members. It should never be allowed to foreclose jury trial for those aggrieved clients who want the traditional remedy, but it should also take the lead in offering easily accessible alternatives, such as informal grievance mechanisms, presuit hearing panels, or arbitration, at the client's option.

In the meantime, consideration should be given to more immediate reforms within the existing tort system. There have recently been considerable ferment and experimentation with proposed reforms, largely in the medical malpractice context.⁹⁸

96. See authority cited at note 92 *supra*.

97. See authorities cited at note 80 *supra*.

98. See Comment, *Legislative Responses to the Medical Malpractice Crisis*, 39 OHIO ST. L.J. 855 (1978), which summarizes recent legislative reforms in three categories. The first category limits the patient's recovery and includes statutes (1) setting a maximum amount recoverable, (2) eliminating punitive damages, (3) abrogating the collateral source rule, (4) limiting the use of the *ad damnum* clause, (5) assuring that payments made to plaintiff before trial will not be introduced into evidence in a later trial or construed as an admission of negligence, (6) providing for installment payments rather than lump sum payments of judgments, and (7) curbing excessive contingent fees or requiring court approval of attorney's fees. *Id.* at 856-60.

The second category modifies substantive law, making the plaintiff's recovery more difficult, and includes legislation affecting (1) the statute of limitations, (2) the doctrine of *res ipsa loquitur*, (3) the doctrine of informed consent, and (4) liability for breach of express contracts. *Id.* at 860-68.

The third category provides for screening panels or arbitration boards to consider medical malpractice claims before they are presented for trial. *Id.* at 855. Other proposed modifications would require special verdicts as to particular damage items, prescribe more careful qualifications for expert witnesses, provide for court-appointed witnesses, and award attorney's fees as part of court costs in the judgment against the losing party.

The following are recent court decisions ruling upon these medical malpractice re-

Some of these proposals to restrict damages are ill-suited to nonmedical cases, where lost economic expectations predominate and where pain and suffering and collateral source payments are rarely involved. But other proposals for procedural reform and tightening statutes of limitations may deserve consideration as applied to nonmedical professions as well as medical malpractice. None of these proposed reforms would change drastically the substantive rules under which the defendant's liability is determined by reference to professional standards. Nor would they alter radically the elements of individual adjudica-

form statutes: *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (provision allowing evidence of collateral sources valid; screening panels valid, but requirement that nonprevailing party post bond before proceeding to trial invalid); *American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.*, 104 Cal. App. 3d 219, 163 Cal. Rptr. 513 (1980) (provision for periodic payment of damages invalid); *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (provision for pretrial medical mediation panel, previously upheld as facially valid, now held invalid because arbitrary and capricious as applied); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (legislation limiting damages may be valid); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) (special statute of limitations for medical malpractice actions valid); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (maximum limit on recovery and delegation of judicial functions to review panel invalid); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980) (recovery limitation and panel requirement provisions of medical malpractice act valid); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980) (provision abrogating collateral source rule valid); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978) (medical review panel requirement and ad damnum clause proscription valid); *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57 (1978), *appeal dismissed*, 439 U.S. 805 (1978) (arbitration panel requirement valid); *Cioffi v. Guenther*, 374 Mass. 1, 370 N.E.2d 1003 (1977) (shortened statute of limitations valid); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977) (screening panel valid); *State ex rel. Cardinal Blennon Memorial Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (requirement of pretrial screening panel invalid); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (upholds elective provisions imposing medical review panel, review of attorney fees, reduction of recovery by insurance, and limitation of recovery to maximum of \$500,000 to qualify for assured judgment fund); *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976) (two-year statute of limitations valid); *Carson v. Maurer*, 49 U.S.L.W. 2502 (N.H. 1980) (statute that imposes two-year limitation, limits recovery to \$250,000, abolishes collateral source rule, and authorizes periodic payments violates state equal protection guarantees); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (statute imposing ceilings on recovery and modifying doctrines of informed consent, *res ipsa loquitur*, and collateral source rule invalid); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976) (*dictum*—ceiling on recovery invalid); *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (Ohio C.P. 1976) (pleading requirements and abrogation of collateral benefits rule invalid); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (section of malpractice act giving medical arbitration panels exclusive jurisdiction invalid as applied); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (provision for periodic payments of large awards valid).

tion or settlement that have been identified as strengths of the traditional tort/liability insurance system.